

No. 11102

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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BEN LIEBMAN, also known as B. LIEBMAN,  
MASSACHUSETTS BONDING AND IN-  
SURANCE COMPANY, a Corporation,  
Appellants,  
vs.

UNITED STATES OF AMERICA for the use  
and benefit of CALIFORNIA ELECTRIC  
SUPPLY COMPANY, a Corporation,  
Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Northern District of California,  
Southern Division

FILED

OCT 3 - 1945

PAUL P. O'BRIEN,  
CLERK



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Circuit Court of Appeals

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

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San Francisco, California,

Attorney for Defendants and Appellants.

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702 Central Tower,  
San Francisco, California,

Attorney for Plaintiff and Appellee.

In the Southern Division of the United States  
District Court, Northern District of California

No. 23289S

UNITED STATES OF AMERICA for the use  
and benefit of CALIFORNIA ELECTRIC  
SUPPLY COMPANY, a corporation,  
Plaintiff,

vs.

BEN LIEBMAN, also known as B. Liebman,  
MASSACHUSETTS BONDING AND IN-  
SURANCE CO., a corporation, First Doe, Sec-  
ond Doe, Black and White Corporation,  
Defendants.

Plaintiff complains of the defendants, Ben Liebman, also known as B. Liebman, Massachusetts Bonding and Insurance Co., a corporation, First Doe, Second Doe and Black and White Corporation, and for cause of action alleges:

I.

That the names of the defendants, First Doe, Second Doe, Black and White Corporation, are fictitious; that the true names of said defendants are unknown to plaintiff; that plaintiff is informed and believes and therefore alleges that said fictitious parties claim some interest in and to the demands herein; that plaintiff prays that when said names are ascertained, this complaint be amended and



that said true names be inserted, and that their rights be adjudicated herein; [1\*]

## II.

That the California Electric Supply Company is, and at all times hereinafter mentioned was, a corporation organized and existing under and by virtue of the laws of the State of California, and licensed to do business in the State of California.

## III.

That the Massachusetts Bonding and Insurance Company is, and was at all times hereinafter mentioned a corporation organized and existing under and by virtue of the laws of the State of Massachusetts, with its principal place of business in Boston, Massachusetts; that said corporation is licensed to do business in the State of California; that at all times herein mentioned said corporation was engaged, and by law was authorized to engage in, the business of a corporation surety on bonds required by law or contract within the State of California by license of said state, and had designated a person residing and who now resides in the City and County of San Francisco, State of California, upon whom process in civil actions against said corporation may be served.

## IV.

That heretofore on or about the 4th day of February, 1943, at the County of Alameda, State of California, the defendant, Ben Liebman, also known

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

as B. Liebman, entered into and executed a formal contract, said contract known and designated as "W868-eng-3690," with the United States of America for the erection of a public building known as a certain additional housing project in the County of Alameda, State of California; that in accordance with the laws of the United States, and the terms of said contract provided said Ben Liebman as principal, and defendant, Massachusetts Bonding and Insurance Company as surety, executed and delivered simultaneously with [2] the execution of said contract, their penal bond known and designated as "#48628-B, Liebman to U.S.A. on Contract #W868-eng-3690." Conditioned that said Ben Liebman should promptly make full payment to all persons supplying materials in the prosecution of said building project; a copy of said bond, marked "Exhibit A" is hereto annexed and made a part of this complaint.

#### V.

That thereafter the said Ben Liebman entered upon and on May 17, 1943 completed the said public work so required by said contract as aforesaid; that during the months of February, March and April, 1943 at the special instance and request of the Aetna Electric Company, a corporation, a subcontractor of Ben Liebman, also known as B. Liebman, the general contractor, and with said Ben Liebman's consent and approval, the California Electric Supply Company supplied certain electrical fixtures and materials, which said electrical fixtures and materials were installed in and at-

tached to said additional housing project pursuant to the terms and conditions of said government contract.

## VI.

That said additional housing project as in said contract provided was and is public work of the United States; that on or about the 24th day of May, 1943, plaintiff, California Electric Supply Company caused to be served, as provided by Title 40, Section 270 B.U.S.C. 1940 Ed. of the laws of the United States of America, on the Department of U. S. Engineers, San Francisco Office, Construction Division, War Department, U. S. Army, a Notice to Withhold Payment and Verified Claim in the amount of \$1,438.52, and simultaneously therewith served a notice to Withhold Payment and Verified Claim in like amount on Ben Liebman, also known as B. Liebman; that both of these notices [3] and claims were verified by plaintiff, California Electric Supply Company; that at the time of said service there was in the hands of said U. S. Engineers and due and payable under the terms of aforesaid contract a sum of money in excess of the claim of California Electric Supply Company; that thereafter the sum of \$1,438.52, amount of plaintiff's claim, was turned over to B. Liebman for the use and benefit of plaintiff herein; that subsequently, contrary to express directions and instructions, and contrary to plaintiff's rights, said defendant, Ben Liebman failed and refused and still does fail and refuse to pay said sum, or any part thereof, to the

California Electric Supply Company, plaintiff herein.

## VII.

That the fair and reasonable value of the electrical fixtures and materials furnished and installed in said project is the sum of \$1,438.52; that none of said sum has been paid and that the whole thereof is now due, owing and unpaid from defendants to plaintiff.

Wherefore: Plaintiff demands judgment for the use and benefit of said California Electric Supply Company against said defendant, Ben Liebman, also known as B. Liebman, and Massachusetts Bonding and Insurance Company, jointly and severally, for the aggregate sum of \$1,438.52 together with interest thereon at the rate of seven per cent (7%) and for the costs of suit incurred herein, and for such other and further relief as may be proper in the premises.

(Signed) EDWARD T. MANCUSO

Attorney for Plaintiff [4]

State of California,

City and County of San Francisco—ss.

L. B. McDonnell being first duly sworn, deposes and says:

That he is an officer of the California Electric Supply Company, a corporation, to-wit, the President thereof, and as such officer, he is hereby authorized to make this verification for and on behalf of said corporation.

That he has read the foregoing Complaint and

knows the contents thereof; that the same is true to his own knowledge except as to those matters stated therein upon information and belief, and as to those matters, he believes it to be true.

(Signed) L. B. McDONNELL

Subscribed and sworn to before me this 10th day of May, 1944.

[Seal] E. J. CASEY

Notary Public in and for the City and County of San Francisco, State of California. [5]

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## PAYMENT BOND

(Construction)

Pursuant to the Act of Congress, approved Aug. 24, 1935 (49 Stat. 793; 40 U. S. Code 270a.)

Bond No. C-48628

Know All Men by These Presents, That we, B. Liebman, an individual of 3319 Fillmore Street, San Francisco, California, as Principal, and Massachusetts Bonding and Insurance Company, a corporation established under the laws of the Commonwealth of Massachusetts and having its principal office in the said Commonwealth, as Surety, are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal sum of Thirty-Five Thousand Two Hundred Thirty-Seven and No/100 Dollars, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and suc-



cessors, jointly and severally, firmly by these presents.

The Condition of This Obligation Is Such, that whereas the principal entered into a certain contract, hereto attached, with the Government, dated February 4, 1943, for Construction of Additional Housing, Oakland Municipal Airport, Alameda, California (Contract No. W-868-eng-3690).

Now, Therefore, if the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof, the above-bounden parties have executed this instrument under their several seals this 11th day of February, 1943, the name and corporate seal of each [6] corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

[Seal]      /s/ B. LIEBMAN

3319 Fillmore St.,  
San Francisco

In the presence of:

/s/ LOUISE RATTO

2645 Scott Street

/s/ E. D. PANGBURN

2222 North Point,  
San Francisco

Attest:

[Seal]            MASSACHUSETTS BONDING  
                    AND INSURANCE COMPANY  
                    (Corporate Surety)  
                    440 Montgomery Street,  
                    San Francisco

By /s/ HENRY G. SHEEHY  
                    Attorney-in-fact  
                    /s/ P. DENAULT

The rate of premium on this bond is \$4.50 per thousand.

Total amount of premium charged, \$17.14.

[Endorsed]:    Filed May 10, 1944. [7]

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[Title of District Court and Cause.]

ANSWER

Come now the defendants above named Ben Liebman, also known as B. Liebman, and Massachusetts Bonding and Insurance Co., a corporation, and answering the complaint of plaintiff on file herein admit, deny and allege as follows:

I.

Admit the allegations of paragraphs II, III and IV.

II.

Answering the allegations of paragraph V of said complaint said answering defendants admit that thereafter the said Ben Liebman entered upon and

on May 17, 1943, completed the [8] said public work so required by said contract, as aforesaid;

Said answering defendants have not sufficient information or belief to enable them to answer the allegations of said paragraph V wherein it is stated that during the months of February, March and April, 1943, at the special instance and request of the Aetna Electric Company, a corporation, a subcontractor of Ben Liebman, also known as B. Liebman, a general contractor, the California Electric Supply Company supplied certain electrical fixtures and materials, which said electrical fixtures and materials were installed in and attached to said additional housing project pursuant to the terms and conditions of said government contract and basing their denial upon said lack of information and belief said answering defendants deny generally and specifically, each and every, all and singular, said allegations;

Further answering the allegations of said paragraph V, said answering defendants deny generally and specifically, each and every, all and singular, the allegations of said paragraph wherein it is alleged that said California Electric Company supplied certain electrical fixtures and materials which were installed in and attached to said housing project pursuant to the terms and conditions of said government contract with the consent and approval of the answering defendant herein, Ben Liebman.

### III.

Answering the allegations of paragraph VI of said complaint said answering defendant admit the



allegations of said complaint commencing at line 22 thereof and ending with the words "Supply Company," line 2, page 4 of said complaint;

Said answering defendants deny generally and specifically, each and every, all and singular, the remaining portions of said paragraph commencing with the words "That at the time" at page 2, line 4 thereof, save and except that said [9] answering defendants admit that the said Ben Liebman has failed and refused and still does fail and refuse to pay said sum of \$1438.52, or any part thereof, to the California Electric Supply Company, the plaintiff herein.

#### IV.

Said answering defendants deny generally and specifically, each and every, all and singular, the allegations of paragraph VII of said complaint.

---

And Now by Way of a Further and Separate and Distinct and Second Answer and defense to the complaint of plaintiff, said answering defendants allege:

#### I.

That on or about the 10th day of December, 1943, the above named California Electric Supply Company, a corporation, suggested to and requested of defendant Ben Liebman that the unpaid indebtedness of said last named defendant to the Aetna Electric Company, a corporation, the bankrupt in those certain proceedings entitled, "In the Southern Division of the United States District Court,

for the Northern District of California, In the Matter of Aetna Electric Co., a corporation, Bankrupt, No. 35800-R in Bankruptcy," to-wit, the sum of \$3230.67, be paid by said Ben Liebman to John O. England, the trustee in bankruptcy and that out of said last mentioned sum there be earmarked and set aside the sum of \$1438.52 until the final determination of the claim filed in said bankruptcy proceeding by said California Electric Supply Company, a corporation; that thereafter and on or about the 29th day of December, 1943, pursuant to said suggestion and request last mentioned, Defendant Ben Liebman, California Electric Supply Company, a corporation, and John O. England as trustee of the said Aetna Electric Company, a corporation, entered into a written stipulation, a copy of which is hereby marked Exhibit "A," attached hereto and made a part hereof, [10] wherein and whereby it was stipulated that Ben Liebman is indebted to Aetna Electric Company, a corporation, said bankrupt, in the sum of \$3230.67 and that California Electric Supply Company, the plaintiff herein, a creditor of said bankrupt corporation, has filed its Proof of Claim in the sum of \$1438.52, to which said Proof of Claim there was attached a copy of a Notice addressed to said Ben Liebman to withhold payment of said amount owing by him to said bankrupt corporation and wherein it was stipulated that John O. England as trustee has made demand upon the said Ben Liebman for the payment of the sum of \$3230.67 and that the said Ben Liebman has refrained from making payment of

the sum of \$1438.52 of said amount upon advice of his counsel on account of said Notice of California Electric Supply Company, a corporation, to withhold as hereinabove set forth, and wherein it was further stipulated that the said California Electric Supply Company, a corporation, the plaintiff herein, consents that the sum of \$1438.52 be paid by Ben Liebman, one of the defendants herein, to John O. England, as trustee in bankruptcy, providing said John O. England agrees to hold said entire sum until the further order of said District Court, and it was further provided in said stipulation that John O. England as trustee in bankruptcy agrees with Ben Liebman and California Electric Supply Company, a corporation, to accept the sum of \$1438.52 from Ben Liebman and to hold the entire amount until further order of the above entitled Court;

That thereafter and on the 4th day of January, 1944, the original of the hereinabove stipulation, Exhibit "A" herein, was filed in said bankruptcy proceeding entitled, "In the Matter of Aetna Electric Company, a corporation, bankrupt";

That on the 29th day of December, 1943, there was paid by the defendant herein, Ben Liebman, pursuant to said stipulation, Exhibit "A" herein, to John O. England, as trustee of Aetna Electric Company, a corporation, bankrupt, the sum of [11] \$3159.67, which represented the full amount due the Aetna Electric Company of \$3230.67, less the sum of \$71.00 which was deducted from the amount due said Aetna Electric Company, a corporation, be-

cause of the failure of said Aetna Electric Company to supply certain labor and material upon said contract job;

That said John O. England accepted said sum of \$3159.67 pursuant to said stipulation filed on said 4th day of January, 1944, in said bankruptcy proceeding hereinabove described;

That included in said sum of \$3159.67 last herein mentioned is said sum of \$1438.52 hereinbefore mentioned;

That said California Electric Supply Company, a corporation, orally agreed with said Ben Liebman that upon said deposit of said sum of \$1438.52 with said John O. England, trustee in bankruptcy aforesaid, that said California Electric Supply Company, a corporation, would release said Ben Liebman from all liabilities, claims and demands of every kind, character and description arising out of the matters and things in said complaint on file herein set forth;

That by reason of the matters and things hereinabove set forth these answering defendants allege that said plaintiff herein is estopped from recovering from these answering defendants or either of them said sum of \$1438.52, or any part thereof.

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And Now by Way of a Further and Separate and Distinct and Third Answer and defense to the complaint of plaintiff, said answering defendants allege:



## I.

That the answering defendant herein Ben Liebman, also known as B. Liebman, at no time entered into any contract, written or otherwise, with said California Electric Company for the furnishing, supplying or installing of electrical fixtures and materials in said housing project identified in said complaint on file herein; that at all of the times herein mentioned the defendant Ben Liebman had [12] contracted with the Aetna Electric Company, a corporation, and with no other firm or person, for the furnishing, supplying and installing of electrical fixtures and materials upon said housing project identified in said complaint of plaintiff on file herein; that any purported furnishing, supplying or installing of electrical fixtures and materials in said housing project, if any, by said California Electric Company, a corporation, the plaintiff herein, was done without the knowledge, permission or consent of the defendant Ben Liebman herein; that your petitioner is informed and believes and upon such information and belief therefore alleges that said plaintiff California Electric Supply Company, a corporation, did not at any time install, furnish or supply any electrical fixtures and materials in said housing project hereinabove referred to;

Wherefore said answering defendants pray that plaintiff take nothing by its complaint on file herein and that they and each of them be hence dismissed with their costs of suit incurred herein.

JOHN J. TAAFFE

JOSEPH C. HAUGHEY

State of California,  
City and County of San Francisco—ss.

Ben Liebman, also known as B. Liebman, being first duly sworn, deposes and says:

That he is one of the answering defendants above named and makes this verification for and on behalf of himself and the other answering defendant herein; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information or belief and as to those matters that he believes it to be true.

BEN LIEBMAN

Subscribed and sworn to before me this 15th day of June, 1944.

[Seal]

JACOB S. MEYER

Court Commissioner of the City and County of San Francisco, State of California. [13]

### EXHIBIT "A"

In the Southern Division of the United States District Court for the Northern District of California

No. 35800-R—In Bankruptcy

In the Matter of Aetna Electric Co., a corporation,  
Bankrupt.

### STIPULATION

It is hereby stipulated by and between Ben Liebman, California Electric Supply Company, a corporation, and John O. England, as Trustee in Bank-

ruptey of the above bankrupt corporation, as follows:

1.

That Ben Liebman is indebted to Aetna Electric Co., the above named bankrupt corporation in the sum of \$3230.67 and that California Electric Supply Company, a creditor of said bankrupt corporation, has filed its proof of claim in the sum of \$1438.52 to which said proof of claim is attached a copy of a Notice [14] addressed to said Ben Liebman to withhold payment of said amount owing by him to the bankrupt corporation being a portion of his total indebtedness of \$3230.67.

2.

That John O. England, as Trustee, has made demand upon Ben Liebman for the payment of said sum of \$3230.67 and the said Ben Liebman has refrained from making payment of \$1438.52 of said amount upon advice of his counsel on account of said Notice of California Electric Supply Company, a corporation, to withhold referred to in the preceding paragraph.

3.

That California Electric Supply Company, a corporation, consents that the said sum of \$1438.52 be paid by Ben Liebman to John O. England, as Trustee in Bankruptcy, providing he agrees to hold said entire sum until the further Order of the above entitled Court.

4.

That John O. England, as Trustee in Bankruptcy,

agrees with Ben Liebman and California Electric Supply Company, a corporation, to accept the sum of \$1438.52 from Ben Leibman and to hold the entire amount until the further Order of the above entitled Court.

Dated this 29th day of December, 1943.

B. LIEBMAN

California Electric Supply  
Company, a corporation

By EDWARD T. MANCUSO

Its Attorney

JOHN O. ENGLAND

Trustee of the bankrupt estate of Aetna Electric  
Co., a corporation

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed June 13, 1944. [15]

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[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW

The above entitled cause came on regularly for trial on the 8th day of February, 1945, before the court sitting without a jury, a jury having been expressly waived; Edward T. Mancuso and Leslie M. Julian appearing as counsel for the plaintiff, and Joseph C. Haughey appearing as counsel for the defendants, Jeanette Liebman, administratrix of the estate of Ben Liebman, also known as B. Liebman, deceased, and Massachusetts Bonding and



Insurance Company, a corporation, and after hearing the allegations and proofs of the parties, the arguments of counsel, and being duly advised in the premises, the following findings of fact and conclusions of law constituting the decision of the court in said action are hereby made.

I.

That each and all of the allegations set forth in [16] Paragraphs II, III, IV, V and VI of the complaint and admitted in defendants' answer are true, and that said contract as alleged in Paragraph IV of said complaint was completed by Ben Liebman on or about the 17th day of May, 1943.

II.

That between the 25th day of February, 1943 and the 30th day of April, 1943 the Aetna Electric Company, a subcontractor of defendant, Ben Liebman, also known as B. Liebman, became indebted to the California Electric Supply Company for electrical supplies and materials furnished them at their special instance and request and used on and affixed to said construction project alleged in Paragraph IV of said complaint in the sum of \$1,438.52; that the said electrical supplies and materials were reasonably worth the sum of \$1,438.52; that no part of the same has been paid; that the whole thereof is now due, owing and unpaid; that said amount is to be reduced by any amount heretofore or hereafter paid on account of said claim from and out of the estate of Aetna Electric Company, a corporation, bankrupt.

## III.

That all the facts and allegations set forth in Paragraph VI of plaintiff's complaint and denied in defendant's answer are true.

## IV.

That Jeanette Liebman, as administratrix of the estate of Ben Liebman, also known as B. Liebman, deceased, by stipulation is substituted in the place and stead of Ben Liebman, also known as B. Liebman, deceased, in so far as the same may be necessary for a complete determination of this action.

## V.

That each and all of the allegations set forth in defendant's answer to plaintiff's complaint are untrue, except that the stipulation set up as Exhibit "A" in said Answer was entered into on the date therein stated and was filed with the referee in bankruptcy as alleged and said sum of \$1438.52 mentioned in said stipulation was deposited with the Trustee in Bankruptcy. [17]

## VI.

That the defendant, Massachusetts Bonding and Insurance Company, a corporation, as surety on the payment bond, and Jeanette Liebman, as administratrix of the estate of Ben Liebman, also known as B. Liebman, deceased, are jointly and severally liable to pay said clam of plaintiff herein.

From The Foregoing Facts, The Court Concludes:—

I.

That the plaintiff is entitled to Judgment jointly and severally against Jeanette Liebman as administratrix of the estate of Ben Liebman, also known as B. Liebman, deceased, and the Massachusetts Bonding And Insurance Company, a corporation, in the sum of \$1,438.52, together with interest thereon at the rate of seven per cent (7%) per annum from the 24th day of May, 1943, said Judgment to be reduced by any amounts heretofore or hereafter paid to plaintiff on account of said claim from and out of the estate of Aetna Electric Company, bankrupt.

The plaintiff is entitled to Judgment for his costs and disbursements incurred or expended herein.

Let Judgment Be Entered Accordingly.

Dated: This 12th day of February, 1945.

JOHN C. BOWEN

Judge of the U. S. District  
Court

Presented by

LESLIE M. JULIAN

Of counsel for Pltff.

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed Feb. 12, 1945. [18]

In the Southern Division of the United States District Court — Northern District of California

No. 23289-S

UNITED STATES OF AMERICA for the use  
and benefit of CALIFORNIA ELECTRIC  
SUPPLY COMPANY, a corporation,  
Plaintiff,

vs.

BEN LIEBMAN, also known as B. LIEBMAN,  
MASSACHUSETTS BONDING AND IN-  
SURANCE COMPANY, a corporation, First  
Doe, Second Doe, Black and White Corpora-  
tion,

Defendants.

### JUDGMENT

This cause came on regularly for trial before the court sitting without a jury, on the 8th day of February, 1945, Edward T. Mancuso and Leslie M. Julian appeared as attorneys for the plaintiff, and Joseph C. Haughey appeared as attorneys for the defendants, Jeanette Liebman, administratrix of the estate of Ben Liebman, also known as B. Liebman, deceased, and Massachusetts Bonding And Insurance Company, a corporation, and the Court having heard the testimony and having examined the proofs offered by the respective parties, and the Court being fully advised in the premises, and having herein its findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith;

Now Therefore, By Reason Of The Law And Findings Aforesaid, It Is Hereby Ordered, Adjudged And Decreed: [19]

That plaintiff, the California Electric Supply Company, a corporation, have Judgment against Jeanette Liebman, administratrix of the estate of Ben Liebman, also known as B. Liebman, deceased, and Massachusetts Bonding And Insurance Company, a corporation, jointly and severally, in the sum of One Thousand Four Hundred Thirty-Eight Dollars and Fifty-Two Cents (\$1,438.52), together with interest thereon at the rate of seven per cent (7%) per annum from the 24th day of May, 1943, until paid, to be reduced by any amounts heretofore or hereafter paid on account of said claim from and out of the estate of Aetna Electric Company, a corporation, a bankrupt.

That plaintiff, the California Electric Supply Company, a corporation, have Judgment against Jeanette Liebman, as administratrix of the estate of Ben Liebman, also known as B. Liebman, deceased, and Massachusetts Bonding And Insurance Company, a corporation, jointly and severally, for his costs taxed at \$30.39.

Dated: This 12th Day of February, 1945.

JOHN C. BOWEN

Judge of the U. S. District  
Court



Findings of Fact and Conclusions of Law Judgment submitted and presented this 12th day of February, 1945.

LESLIE M. JULIAN

Counsel for Plaintiff.

[Endorsed]: Filed Feb. 12, 1945. [20]

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[Title of District Court and Cause.]

### ORDER

Defendants' "Notice of Intention to Move for a New Trial", regarded by counsel and by the Court as a Motion for New Trial, having been presented and having by both sides been submitted to the Court for decision, and the matter having been taken under advisement by the Court, and the Court being now of the opinion that said motion should be overruled, and being otherwise fully advised in the premises; now, therefore, it is hereby

Ordered that Defendants' Motion for New Trial (denominated "Notice of Intention to Move for a New Trial") be, and hereby is, denied.

Exception allowed Defendants.

Dated at Seattle, Washington, this 19th day of March, 1945.

JOHN C. BOWEN

United States District Judge

[Endorsed]: Filed Mar. 22, 1945. [21]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Jeanette Liebman, administratrix of the estate of Ben Liebman, also known as B. Liebman, deceased; Massachusetts Bond And Insurance Co., a corporation, the defendants in the above entitled action, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment heretofore, to-wit, on the 12th day of February, 1945, given, made and entered in and by the *by the* District Court of the United States for the Northern District of California, Southern Division, in the above entitled action and from the whole of said Judgment, which said Judgment is in the words and figures following, to-wit:

(Here Follows The Judgment Which Has Been Copied)

Dated: April 17th, 1945.

JOSEPH C. HAUGHEY

Attorney for defendants and  
appellants.

(Acknowledgment of Receipt of Copy)

[Endorsed]: Filed Apr. 20, 1945. [22]

[Title of District Court and Cause.]

STATEMENT OF THE POINTS ON WHICH  
APPELLANTS INTEND TO RELY ON AP-  
PEAL

Now come the above named appellants and pursuant to the provisions of Section (6) of Rule 19 of this Court file this, their statement of the Points on which they intend to rely on the appeal, and designate herewith the parts of the record which they think necessary for the consideration thereof. In this behalf the said appellants hereby adopt their statement of points on which appellants intend to rely on appeal filed in the District Court of the United States for the Northern District of California, Southern Division, the Court from which this appeal is taken, which statement is a part of the Record on Appeal in the above entitled cause; and appellants hereby [23] designate all of the said Record on Appeal as necessary for the consideration of said appeal.

Dated: This 17th day of April, 1945.

JOSEPH C. HAUGHEY

Attorney for Defendants and  
Appellants.

Receipt of a copy of the within Statement is hereby acknowledged this 17th day of April, 1945.

EDWARD T. MANCUSO

Attorney for Plaintiff and  
Appellee.

[Endorsed]: Filed Apr. 20, 1945. [24]



[Title of District Court and Cause.]

DESIGNATION OF POINTS ON WHICH APPELLANTS INTEND TO RELY ON APPEAL

Come now the above named defendants, and, pursuant to the provisions of Subdivision (d) of Rule 75 of the Federal Rules of Civil Procedure, file this, their designation of the points on which they intend to rely on their appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit:

1. That the District Court erred in granting judgment for the plaintiff;

2. That the District Court erred in ruling that the written stipulation entered into between the plaintiff and the defendant Liebman and the trustee in bankruptcy did not release [25] the defendant Liebman and his surety Massachusetts Bonding and Insurance Company from the Obligation sued upon;

3. That the District Court erred in ruling that the Miller Act (40 U.S.C.A. 270(b) ) is a special suretyship right;

4. That the District Court erred in holding that the written stipulation entered into between the plaintiff and the defendant Liebman and the trustee in bankruptcy did not constitute a waiver by the plaintiff of its rights under the Miller Act (40 U.S.C.A. 270(b) );

5. That the District Court erred in ruling that upon the facts and the law plaintiff had shown a right to recovery.

Dated: This 17th day of April, 1945.

JOSEPH C. HAUGHEY

Attorney for Defendants and  
Appellants.

Receipt of a copy of the foregoing Designation of Points is hereby acknowledged this 17th day of April, 1945.

EDWARD T. MANCUSO

Attorney for Plaintiff and  
Appellee.

[Endorsed]: Filed Apr. 20, 1945. [26]

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[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD  
ON APPEAL

Come now the above named defendants and, pursuant to the provisions of Rule 75 of the Federal Rules of Civil Procedure file this, their Designation of the portions of the Record, Proceedings and Evidence to be contained in the Record on their appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit:

1. The caption.
2. The names and addresses of counsel.
3. The complaint.
4. The answer of defendants.
5. Findings of Fact and Conclusions of Law.
6. The Judgment.
7. Notice of Appeal.

8. Designation of contents of Record on Appeal.

9. Statement of Points on which appellants intend to rely on the appeal.

10. The full and complete Reporter's Transcript of the testimony, direct and cross-examination, of Edward T. Mancuso and of Joseph C. Haughey given upon the trial.

11. Memorandum Opinion of the Court.

Dated: This 17th day of April, 1945.

JOSEPH C. HAUGHEY

Attorney for defendants and  
appellants.

Receipt of a copy of the foregoing Designation of Contents of Record on Appeal is hereby acknowledged this 17th day of April, 1945.

EDWARD T. MANCUSO

Attorney for Plaintiff and  
Appellee.

[Endorsed]: Filed Apr. 20, 1945. [28]

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[Title of District Court and Cause.]

### ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellants may have to and including July 9, 1945, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: May 29, 1945.

A. F. ST. SURE

United States District Judge.

[Endorsed]: Filed May 29, 1945. [29]

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[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellants herein may have to and including July 19, 1945, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: July 9, 1945.

MICHAEL J. ROCHE

United States District Judge.

[Endorsed]: Filed July 9, 1945. [30]

In the Southern Division of the United States  
District Court, In and For the Northern Dis-  
trict of California

No. 23,289

UNITED STATES OF AMERICA, For the Use  
and Benefit of CALIFORNIA ELECTRIC  
SUPPLY COMPANY,

Plaintiff,

vs.

BEN LIEBMAN, also known as B. LIEBMAN,  
The MASSACHUSETTS BONDING INSUR-  
ANCE COMPANY, a corporation, et al.,

Defendants.

Monday, February 5, 1945

Before: Hon. John C. Bowen,  
Judge.

Counsel Appearing:

For Plaintiff:

Edward T. Mancuso, Esq.

L. M. Julian, Esq.

For Defendants:

Joseph C. Haughey, Esq.

EDWARD T. MANCUSO,

called as a witness by plaintiff; sworn.

The Clerk: Will you please state your name to  
the court?

A. Edward T. Mancuso, 60 Urbano Drive, San  
Francisco.

(Testimony of Edward T. Mancuso.)

Mr. Julian: Q. Now, Mr. Mancuso, you were attorney for [31] Mr. McDonnell of the California Electric Supply Company in February, March and April, 1943?

A. Yes.

Q. In that capacity you did certain acts in the process of collecting the claim which is the subject of this suit, \$1438.52?

A. That is correct, yes.

Q. Will you describe to the court in as chronological way as possible just what steps you took with respect to this claim?

A. In the early part of May, 1943, Mr. McDonnell, of the California Electric Company, consulted me about the indebtedness owing by the Aetna Electric Company on the Oakland Airport job in the sum of \$1438.52, and told me that although he had had discussions with Mr. Liebman concerning the job, that Mr. Liebman was the general contractor, and also that the Aetna Electric Company had not received all payments on the job, and he was fearful of the fact that the job might go sour. He advised me that the Aetna Electric Company had been advising him that they had money coming from the general contractor and it had not been paid.

Mr. Haughey: I am going to object to this as hearsay as against the defendants Liebman and the Massachusetts Bonding Company, that he advised that defendant was going sour.

Mr. Julian: It is all part of the transaction.



(Testimony of Edward T. Mancuso.)

A. I was advised by Mr. McDonnell that the California Electric Supply Company, in other words, as I said——

The Court: That objection is overruled. Do not state [32] what he told you, just leave it where you have already stated.

A. He wanted to know what his legal rights were under the circumstances, so I asked Mr. McDonnell if the job was bonded, and he advised me that it was, so I told him that the step that was necessary would be to file a verified notice to withhold payment.

The Court: I doubt if the witness should be permitted to state that. You can state what you did. He consulted with you concerning the matter and you did certain things for him.

A. Well, that is what I was just going to say.

Mr. Haughey: I think we could shorten this. We can stipulate that on behalf of the California Electric Supply Company, Mr. Mancuso, as its attorney, served upon the United States Engineer a notice to withhold payment of money due by Lieberman to Aetna Electrical Supply Company. Is that right?

A. Yes, that was on May 24.

Mr. Haughey: We will stipulate to that, and pursuant to that notice was served on the United States Engineers and notice was served on Mr. Lieberman.

A. Yes.

(Testimony of Edward T. Mancuso.)

Mr. Julian: This was done on or about May 24, 1943, is that correct?

A. That is correct. And on the same day I notified the Massachusetts Bonding Company. I think I have a copy of the letter.

Mr. Haughey: We can stipulate that the correspondence [33] had between Mr. Mancuso and the Massachusetts Bonding Company go in evidence.

A. The letter I was referring to, if your Honor please, is not here, but is in the Bankruptcy Court, and on the same day I notified, that was May 24, 1943, the Massachusetts Bonding Insurance Company that I had served the withholding notice on the United States Engineers and also on Mr. Ben Liebman, and immediately thereafter I received a telephone call from Mr. Liebman advising me of the receipt of the withholding notice, verified withholding notice, and asked me what he was supposed to do.

Mr. Julian: This is going in by stipulation as a copy of the withholding notice.

The Witness: The instrument that I mean is identified as Exhibit No. 11; that is a copy of the notice to withhold.

Mr. Haughey: At this time, if your Honor please, the defendant Ben Liebman and Massachusetts Bonding Insurance Company will stipulate that the exhibits already marked for identification Plaintiff's No. 2 to 11 inclusive may be entered in evidence.

The Court: Do you offer them?



(Testimony of Edward T. Mancuso.)

Mr. Julian: Yes.

The Court: These exhibits, each and all of them, are now admitted. You may read any part of one or call the witness' attention to any part of one or all of the exhibits that you wish. [34]

Mr. Julian: Q. Will you continue on with your testimony, Mr. Mancuso?

A. Exhibit No. 11 of plaintiff is a copy of the notice to withhold payment, a verified claim that I prepared and served on Mr. Liebman and the United States Engineers, and as I said, several days after that had been served upon Mr. Liebman he phoned me at my office and advised me that he had discussed this matter with Mr. McDonnell since he had received this notice to withhold payment, and that he was owing to the Aetna Electric Company approximately \$3000 that still had not been paid by the United States Engineers, and asked me what he should do under the circumstances, and I said, I advised Mr. Liebman at that time to take the matter up with his attorney, at which time he advised me that he did not have an attorney, and that he had informed Mr. McDonnell that he would see that this claim was paid, but he did not understand why the verified notice to withhold payment was served upon him. So I explained to Mr. Liebman at that time that was a step that we had to take as a necessary precaution to protect ourselves under the Miller Act. Thereafter, approximately a period of about a week or ten days I received another telephone call from Mr. Liebman.

(Testimony of Edward T. Mancuso.)

Mr. Haughey: Will you fix that date?

A. I would say that was the early part of June, 1943, sometime between the 3rd and 6th, in that neighborhood, advising me [35] that he had been consulting with Mr. McDonnell again and wanted to know if I had any suggestion to make, and I said, "The only suggestion that I can make, Mr. Liebman, is that you pay the amount of this claim." And he again advised me that he still had not received the money from the United States Engineers Office, and that as soon as it would be paid he would see that the claim was paid to the California Electric Supply Company. Immediately following that conversation, within a period of the next two weeks, I received a telephone call from a group of attorneys here, of which Mr. May was one, advising me that he would call on me in behalf of the indebtedness owing by the Aetna Electric Company to the California Electric Supply Company, and stating that in going over the records he found that they were in a very embarrassing situation, and wanted to know if we would accept 50 cents on the dollar in settlement of the amount of that claim, together with the amount that was owing on the books to the California Electric Supply Company, which totaled in the neighborhood of \$3000; in other words, the total claim at that time was around \$4400. I advised Mr. May that I would consult with my client, which I did, and I subsequently advised Mr. May we would accept 50 cents on the dollar on the open book account of the Aetna Elec-

(Testimony of Edward T. Mancuso.)

tric Company, but would not accept 50 cents on a dollar on the claim owing on the Oakland Airport, due to the fact that it was my opinion that we had a priority claim, that we could look to the bonding [36] company for payment, and under the circumstances I felt that we were justified in taking that position. About two weeks later, which was the latter part of June or around the first of July, somewhere, along there, I received another telephone call from Mr. May's office, advising me that due to the fact that California Electric Supply Company would not care to accept 50 cents on the dollar they were fearful that the Aetna Electric Company would have to go into bankruptcy, and asked me if I would not again care to accept 50 cents on the dollar on behalf of my client, and I took the position at that time that we had said prior that we would accept 50 cents on the dollar for the open book account, but that we demanded the full payment of the claim of \$1438, and at that time I was advised by them as far as we were concerned we could proceed under the Miller Act, and I told them I would stand on that right. Subsequent to that, the next thing that took place was the notification of the fact that the Aetna Electric Company had filed a petition in bankruptcy in the district court, which I believe was in August of 1943.

Mr. Haughey: I think that is right.

A. I immediately then filed a claim with the bankruptcy court, setting forth the total amount

(Testimony of Edward T. Mancuso.)

of the indebtedness owed by the Aetna Electric Company, and also contended that \$1438 of that amount represented a priority claim, and I also served in the bankruptcy court a notice to withhold. Subsequent to [37] the filing of that claim I received notice from the attorney, Mr. Conners, representing the Trustee in Bankruptcy, that they could not accept the claim as a priority claim and advised me that as far as they were concerned that the assets that were going to the Aetna Electric Company by Ben Liebman were distributable to the general creditors, and as attorney for the bankrupt, attorney for the trustee for the bankrupt he would have to demand that Ben Liebman pay over to the bankruptcy court all of the money that was owing. As a result of that I filed a petition in the bankruptcy court to established the claim of \$1438.52 as a priority claim under the basis of the Miller Act.

The Court: Against the estate of the bankrupt?

A. Against the trustee and against the bankrupt estate, and that was the matter before Judge Wyman; the attorneys representing Massachusetts Bonding Company did not appear, nor did the attorney representing Mr. Liebman, and we produced evidence through Mr. McDonnell of the California Electric Supply Company establishing the amount of the claim, and Judge Wyman, on the objection of Mr. Conners, refused to admit the testimony in evidence, Judge Wyman stating that as far as he was concerned that any claim that the California



(Testimony of Edward T. Mancuso.)

Electric Company might have against the Aetna Electric Company and Ben Liebman on the bond was a separate and distinct transaction from the bankruptcy court, that as far as the bankruptcy court was concerned that any money that was owing by Liebman to California Electric [38] Supply Company were assets that were owing to the trustee and the trustee could received them for the general creditors. Then I made an offer of proof to the bankruptcy court of the evidence to sustain our claim and submitted the case, with the understanding that the judge would receive briefs, I think the time allowed for them was 5, 5 and 3. Subsequent to that time, Mr. Conners and myself appeared before Judge Wyman and on that particular date Mr. McDonnell was not present, and discussed with him the briefs that had been filed. Judge Wyman called to our attention that we were really discussing a moot question in that the trustee had not yet received any money from Mr. Liebman, that Mr. Liebman had not paid the money over to the bankruptcy court, and that before the judge could make a ruling on the matter it would be necessary that the amount that Mr. Liebman owed to the Aetna Electric Company would have to be paid into the bankruptcy court. So I advised the judge at that time that as far as we were concerned we had spoken to Mr. Liebman about that, and Mr. Liebman on the advice of his attorney had informed us that he would not make any payment until a court order was made. So Judge Wyman at that time then sug-

(Testimony of Edward T. Mancuso.)

gested that if I would communicate with the attorney representing Mr. Liebman and see if I could get him to deposit the money in court it would do away with the necessity of the trustee filing a suit against Mr. Liebman for the purpose of compelling him to pay the money into court. [39] So I then consulted with Mr. Haughey and explained to him what had taken place, and that the bankruptcy court was very much put out over the fact that there was no appearance by the bonding company and by the attorney representing Mr. Liebman, and that Judge Wyman had suggested that a stipulation be entered into for the purpose of depositing this money in the court so that it would not be necessary to file a suit by the trustee.

Mr. Julian: May I interrupt just a moment? You are referring now to the stipulation which is appended to the defendant answer as an exhibit, is that correct?

A. That is correct. When we discussed the matter about the stipulation with the judge when he suggested a stipulation, I advised Judge Wyman that I was not familiar with the proceedings before the bankruptcy court and the Federal court, and that I did not want to jeopardize any right I might have to proceed against the bonding company in case this stipulation was entered into. Judge Wyman advised me at that time——

Mr. Haughey: Just a moment, I am going to object to this as hearsay and not binding upon the defendants.



(Testimony of Edward T. Mancuso.)

The Court: He can say what he did and what Judge Wyman did is a matter of public record.

Mr. Haughey: That is correct. The court can take judicial notice of what Judge Wyman did.

The Court: Do not say what he said unless he said it in the course of an opinion, in some authoritative way. [40]

A. If your Honor please, the judge was on the bench and Mr. Conners and myself were discussing with him the fact that there had been no appearance by these other parties, and it was a moot question as far as he was concerned, and he would not rule upon it until the money was before the court, and Judge Wyman suggested that a stipulation could be entered into whereby this money could be paid into court.

Mr. Haughey: I am going to object to this on the ground it is hearsay and not binding on the defendant.

The Court: If pursuant to some suggestion Judge Wyman made a stipulation was entered into that is all right, if you wish to put it that way, but do not state what he said.

A. Pursuant to the request of Judge Wyman I consulted with the attorneys representing Mr. Liebman and wanted to know if they would be interested in entering into a stipulation. I explained to them, to Mr. Haughey, that I had advised Judge Wyman that I was not going to enter into this stipulation if that would jeopardize the rights of the California

(Testimony of Edward T. Mancuso.)

Electric Supply Company to proceed on the bond against Mr. Liebman in case the court should hold that we did not have a priority claim. I also advised him at that time that Judge Wyman had informed me that the only way the bankruptcy court could proceed with the matter further would be for this stipulation to be entered into, and at that time also had advised me that the right of the California Electric Supply Company against Liebman and the bonding company [41] was a separate and distinct transaction from the matter that was before the bankruptcy court; that any determination that they might make in that connection might result in Ben Liebman paying the claim twice.

Mr. Haughey: If your Honor please, I am going to object to this testimony and ask that it be stricken. It is an attempt to vary the terms of a written contract. It is our position that the stipulation is a written contract, and this particular evidence is an attempt to vary the terms of it.

Mr. Julian: This is a conversation which took place between the parties who made the contract, and the preliminary steps do not necessarily vary, but rather explain the contract.

The Court: Isn't it a fact that after all of the conference and all of the statements of the Referee in Bankruptcy the parties undertook to put in the form of a written instrument their arrangement?

Mr. Julian: That is correct.

The Court: The objection is sustained.

(Testimony of Edward T. Mancuso.)

A. After I had my conversation with Mr. Haughey I entered into the stipulation which is Exhibit A of the Defendants' Answer. Upon that stipulation being entered into, Mr. Liebman, I was informed, deposited the money with the bankruptcy court and a new date was set for hearing of the petition to establish our priority claim, and at the request of the referee I also served a copy of that notice of hearing on the bonding company and on [42] the attorney representing Mr. Liebman. At the time that matter came up for hearing there was still no appearance by anyone other than myself and Mr. Connors, at which time the matter was taken under submission by Judge Wyman, who subsequently rendered his decision rejecting our claim as a priority claim, and then we subsequently filed an appeal to the court of appeals, and Judge Roche sustained the ruling of Judge Wyman to the effect that the funds in the hands of the trustee which we had received from Mr. Liebman were funds from the general creditors and that we were not entitled to establish a priority to any portion thereof. Subsequent to that the bankruptcy court then served notice upon our office that they were going to proceed for the purpose of determining our claim, if there was any claim, and set it on the calendar, and through stipulation they agreed to acknowledge it as a general claim; in other words, the total indebtedness was approximately forty-two hundred and some odd dollars; in other words, they acknowledged it as a general claim of California

(Testimony of Edward T. Mancuso.)

Electric Supply Company against Aetna Electric Company.

The Court: In other words, the general unsecured claim of the California Electric Supply Company against the bankrupt estate of the Aetna Electric was allowed in the total sum of that larger sum there mentioned?

A. Yes.

Q. Which included this claim of \$1438.52 for material delivered to the Oakland Airport job and the subcontractor job of [43] the Aetna Electric Company?

A. Yes.

Q. Is that right?

A. That is correct. Since then we have received nothing from the bankruptcy court for the settlement of the account and have up to the present received no payment thereon, and we have been advised that there will be a remittance somewhere in the neighborhood of 20 or 25 per cent on that claim, and that money has not been paid up to the present time. I have some correspondence here that I had with the bonding company, advising them of the status of the claim of Mr. Liebman which has already been introduced in evidence.

The Court: May I see those?

A. One I believe, your Honor, is from the United States Engineers as to the date of completion. We were interested in that date and they advised us by letter which was introduced that the

(Testimony of Edward T. Mancuso.)

job was completed on I believe the 17th of May, 1943.

Mr. Julian: I think you are in error. It was the 7th of September, 1943.

A. Yes. I subsequently received a notice from the Federal Government in Washington that final payment was made on the job on September 7, 1943.

The Court: Mr. Mancuso, did the trustee in bankruptcy ever receive from Mr. Liebman any item including \$1438.52 which they owed to the plaintiff in this case?

A. Mr. England received from Mr. Liebman the amount of money that was owing to the Aetna Electric Company, according to his record, less the \$1438.52 prior to entering into a stipulation, and after the [44] stipulation was entered into Mr. Liebman paid over to him the sum of \$1438.52 additional.

Q. From the account of the Aetna Electric and the bonding company?

A. As an indebtedness owing to the Aetna Electric Company.

The Court: We will take a recess now until 2:15.

(A recess was thereupon taken until 2:15 p.m.) [45]



Afternoon Session, 2:15 O'Clock p. m.

EDWARD T. MANCUSO,  
recalled:

Cross-Examination

Mr. Haughey: Q. Mr. Mancuso, do you recall on or about the month of December, 1943, telephoning me in connection with the conversation you had with Referee Wyman? A. I do.

Q. Do you recall at that time suggesting to me as one of the attorneys for Mr. Liebman that the money should be paid over to the trustee in bankruptcy?

A. I told you that the referee in bankruptcy said that the money had to be paid into the trustee.

Q. You told me at that time that Liebman should pay the money that he owed the Aetna Electric Company over to the trustee in bankruptcy, is that right?

A. I told you that Judge Wyman informed me that if the money was not paid in voluntarily it would be necessary for the trustee to file suit and that he recommended that we enter into a stipulation that the money be paid to the trustee.

Q. Now, didn't you at that time also tell me, Mr. Mancuso, that the money would be taken over to the trustee in bankruptcy, and that the money claimed by the California Electric Supply Company would be earmarked? Do you remember using that term?

A. I used the word "earmarked." I said that the court, Mr. Wyman, said if the money was turned in to the bankruptcy court by stipulation it would be earmarked and held by the trustee [46] until



(Testimony of Edward T. Mancuso.)

there was a determination of the priority claim filed by the California Electric Supply Company.

Q. And did you also say at that time that Liebman should pay the money over to the trustee so that he would avoid liability for payment of this amount twice under that bond?

A. No, I don't recall that.

Q. You don't recall that?

A. No, I recall positively I did not make that statement.

Q. All right now, Mr. Mancuso, will this refresh your recollection: Didn't I tell you during the course of our conversation that this entire transaction was Greek to me and that if you wanted it done I would rather have a letter to that effect?

A. I don't remember that. I remember that I questioned you as to why you were not in court, and you told me that you were not requested to be in court by either Mr. Liebman or the bonding company, and I subsequently advised you that when I had served the bonding company with the notice to appear at the second hearing that they had informed me that they had requested Mr. Taaffe's office to represent them on that bankruptcy matter.

Q. You have no recollection of mentioning that if Liebman did not pay he would probably be liable for payment twice under that bond?

A. No, I do not. When I discussed the question of entering into the stipulation I believe I asked you to prepare the stipulation, isn't that correct, Mr. Haughey?

(Testimony of Edward T. Mancuso.)

Mr. Haughey: Will you mark this for identification Defendants' [47] Exhibit A-2 For Identification, mark this A-3 For Identification, this A-4 For Identification, and this A-5 For Identification.

Q. Mr. Mancuso, during sometime in the month of December, 1943, your office prepared a stipulation respecting this matter, is that so?

A. I cannot recall whether I prepared this stipulation or you did it; I have been trying to recall; in fact, I just went over to the bankruptcy court and I looked at the original to see who it was prepared by.

Q. I show you what has already been marked Defendants' Exhibit A-2 For Identification, what purports to be a stipulation in the matter of Aetna Electric Company, a corporation, bankrupt, and ask you to inspect that and let us know whether or not that was prepared in your office.

A. As I say, I do not recall whether it was prepared in my office or your office, but this is my signature on this stipulation. I really could not recall.

Q. Have you any of your stationery here today?

A. Yes, I have a lot of it here.

The Court: Is that of vital importance?

Mr. Haughey: My purpose in doing this is to show this emanated from the office of Mr. Mancuso, and in fact Mr. Taaffe and myself as attorneys did not see this until it was received by us from Mr. Mancuso's office, and then in turn by us forwarded to Mr. Liebman.

A. That may be true, I don't remember. [48]

Q. I will show you what has been identified as

(Testimony of Edward T. Mancuso.)

Defendants' Exhibit 3 for Identification, which is a letter on your stationery.           A. Yes.

Q. Did you not sign this letter bearing date December 23, 1943, directed to me, and signed by you? That is your signature, is it not?

A. No, that is my secretary's writing, but that is my statement. I dictated that letter.

Q. And authorized its transmittal?

A. Oh, yes.

Q. Does that refresh your recollection as to whether or not this stipulation was prepared by you?

A. No, it does not, because I kind of seem to recall that I asked you to prepare the stipulation, and then it was sent to me, and then I got the signatures and mailed them to you. I do not recall whether you prepared it or I prepared it.

Q. I show you a stipulation which has been marked Defendants' Exhibit A-2 and ask you to examine that and let me know if your signature is affixed thereto.           A. Yes.

Q. And it is signed on the second page, is that right?           A. That is right.

Q. I also ask you, do you know if that is the signature of John O. England?           A. I think it is.

Mr. Haughey: At this time I ask that there be introduced as Defendants' Exhibit next in order the instrument that has heretofore been identified as A-3 For Identification, and ask that it be deemed in evidence. [49]

Mr. Julian: No objection.

The Court: A-3 is now admitted.

(Testimony of Edward T. Mancuso.)

Mr. Haughey: I would likewise ask that there be introduced in evidence at this time the instrument that has previously been marked as Defendants' Exhibit A-2 For Identification.

Mr. Julian: No objection.

The Court: Admitted.

(The documents referred to were admitted in evidence and marked, respectively, Defendants' Exhibits A-2 and A-3.)

Mr. Haughey: Counsel, will you stipulate that this was received?

Mr. Julian: Yes.

Mr. Haughey: My reference was, your Honor, to Exhibit A-5 For Identification, which is a check signed by B. Liebman, which is check 1595, and by stipulation that may go into evidence.

Mr. Julian: It may go in.

The Court: Exhibit A-5 is now admitted.

(The document was admitted in evidence and marked Defendants' Exhibit A-5.)

Mr. Haughey: Will you stipulate that the original of that letter was sent by Mr. Liebman to Mr. England, the trustee? A. Yes.

Q. And that if Mr. England were called here he would testify that he received the original of this matter, which has been already marked Defendants' No. A-4 For Identification? [50]

A. Yes, we will stipulate to that.

Q. If Mr. England were called here he would admit he received the original of this letter, together

(Testimony of Edward T. Mancuso.)

with the check that has been identified as Defendants' Exhibit A-5. This letter bears date December 29, 1943. It shows J. O. England.

A. Wait a minute. We are not going to stipulate that the letter is binding in any way upon the California Electric Supply Company.

The Court: I would like to know what it is you are referring to. Is it A-5?

Mr. Haughey: The letter is A-4.

The Court: You offer it in evidence now?

Mr. Haughey: Yes, I am offering it in evidence.

The Court: Is there any objection to it?

Mr. Julian: Yes, we object to it to this extent, that there are self-serving declarations in it which do not bind us. It is between two other parties, Mr. Liebman and Mr. England. Mr. England is not a party to this transaction.

Mr. Haughey: They have already stipulated that if Mr. England were called here he would testify that he received the original of this letter.

The Court: You make no objection that the exhibit is a copy instead of this letter.

Mr. Mancuso: We make no objection. We will stipulate if Mr. England was called he would testify he received the [51] original of that together with the check, but we do object to its introduction in evidence in so far as the California Electric Supply Company is concerned, and in this connection it is our contention that it is an entirely self-serving dec-



(Testimony of Edward T. Mancuso.)

laration and has no bearing on this case. Mr. England is not a party to the action.

The Court: Does this amount of money mentioned in the letter, the check being Defendants' Exhibit A-5, include the disputed sum of \$1438.52?

Mr. Haughey: Yes, it does, your Honor.

The Court: The objection is overruled.

Mr. Julian: May we note an exception?

The Court: Defendants' Exhibit A-4 is now admitted in evidence.

(The document was marked Defendants' Exhibit A-4 in evidence.)

Mr. Haughey: That is all with this witness, your Honor.

Mr. Julian: I have no further questions. [52]

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JOSEPH C. HAUGHEY,

called as a witness by the defendants; sworn.

The Witness: I reside at 701 Twenty-fifth Avenue, San Francisco, California. I am an attorney-at-law duly admitted and licensed to practice.

Mr. Julian: We will stipulate to your qualifications.

The Witness: In the month of December, 1943 and for sometime prior thereto, and also after that date, John J. Taaffe and I represented Ben Liebman who was a contractor and builder and one of the defendants in this case. I received a telephone call



(Testimony of Joseph C. Haughey.)

at my office at 630 Phelan Building from Mr. Edward Mancuso, one of the attorneys for the plaintiff in the case. He said that he had been at a hearing held before Burton J. Wyman, the Referee in Bankruptcy, on December 9, 1943, and in connection with the affairs of the Aetna Electric Company and the claim of his client, the California Electric Supply Company, arising out of material furnished by his client on a project over in Oakland known as the Oakland Airport project. He said that it was suggested by Judge Wyman that the money owed by Liebman, which was in excess of \$3,000, be paid over to the trustee in bankruptcy, and that out of that sum of three thousand odd dollars the sum of \$1438, which the California Electric Supply Company is claiming under the withhold notice which they had filed on Liebman and the United Engineers, that that amount, that is \$1438, should be earmarked and set aside until a final [53] determination of the matters involved, so that Liebman would not be liable for payment twice under his bond. When Mr. Mancuso related these matters to me I told him that it was all Greek to me, to repeat it slowly and I would make a memorandum of what he wanted and I would get hold of Liebman either by telephone or writing to him, and I would give him Mr. Mancuso's message. So Mr. Mancuso repeated in detail what he wanted done, because I remarked to him at the time that the subject matter was all Greek to me and I needed some notes in connection with it. So I at that time wrote down and made a memorandum of what was

(Testimony of Joseph C. Haughey.)

requested of Mr. Liebman, and thereupon dictated a letter to Mr. Liebman. There was no mention in the course of our conversation between Mr. Mancuso and me that the California Electric Supply Company was not prejudicing its rights by this arrangement. No discussion was had at all regarding the prejudicing of California Electric Supply Company's rights. Mr. Mancuso did say that if Liebman conformed to this general plan and scheme that it would save him from paying under his bond twice. That was the sum and substance of our conversation. Subsequently I received either two or three copies of a stipulation, the stipulation already being entered in evidence here, and I forwarded it on to Liebman and subsequently—I don't know whether I received the original from Mr. Liebman or whether he mailed it in to Mr. Mancuso, or what happened. I know that they were forwarded to Mr. Liebman and subsequently filed. That is all. [54]

#### Cross-Examination

Mr. Julian: Q. Mr. Haughey, in this stipulation you at no time ever suggested any changes or alterations, did you. A. No.

Q. You accepted it as it was drawn, in its original form? A. That is right.

Q. You appreciated, after reading the stipulation, that it nowhere waived the right provided by the Miller Act?

A. No mention is made in the stipulation regarding waving of any right.

(Testimony of Joseph C. Haughey.)

Q. Isn't that true because you were cognizant of the fact that Mr. Mancuso in his conversation had insisted that he would not waive those rights in behalf of his client?

A. No, that is not so. Mr. Mancuso made no mention of any waiver of rights by the California Electric Supply Company. The matter was not even mentioned, it was not discussed.

Q. Wasn't the possibility of an adverse ruling in the bankruptcy court ever discussed?

A. Never discussed at any time or entered into the stipulation.

Q. You say you made a memorandum of the conversation between yourself and Mr. Mancuso?

A. Rough notes so that I could dictate a letter.

Q. You do not have those notes?

A. Unfortunately I have not.

The Court: You do not have the notes that you made of the conversation?

A. No. All I have is my letter which was written from the notes. If you want to see the letter I have it [55] right here.

Mr. Julian: Q. No. Mr. Mancuso at no time ever requested or suggested the stipulation?

A. He might have requested it, I would not say whether he did or did not.

Q. After you received that stipulation did you go into the matter with Mr. Liebman as well as the bonding company?

A. My recollection is that I showed it to Mr. Taaffe, consulted with him in connection with it. I

(Testimony of Joseph C. Haughey.)

do not know whether Mr. Liebman was in our office when we decided that the stipulation was all right, and it was O.K. for Liebman to sign it. But I know I did consult with him with respect to its provisions and we agreed that the stipulation in its form was all right and Liebman could not be prejudiced by it.

Q. Did you say to him it was all right?

A. Yes, we told him it was O.K. to sign the stipulation.

Q. You never gave a legal opinion other than your own conclusion?

A. That is right, I made no research of the law with respect to the matter.

Mr. Mancuso: Is it all right if I ask a question?

The Court: Any objection to his asking a question? A. No.

Mr. Mancuso: Q. Did you inspect the original on file of this stipulation?

A. You mean in the——

Q. (Interrupting): In the bankruptcy court, or district court. A. Yes, I did. [56]

Q. Isn't it a fact that the original stipulation bears a red line on it?

A. As to that I could not say. I know I inspected it. I can identify this. The writing on Defendants' Exhibit in Evidence A-2 reading: "Filed January 4, 1944, with Referee in Bankruptcy" was written by me in the office of the referee at the time I inspected the original, and at that time I wrote in the signature "B. Liebman" on the copy that I have just put in evidence.

(Testimony of Joseph C. Haughey.)

Q. I think if you will remember you will find that you mailed my office two copies of the original stipulation which bears a red line on it and then I probably typed up a couple of copies and mailed a copy back to you; I think you will find on inspection that I just sent the original stipulation that was drawn on paper from your office rather than my office.

A. It is not on my paper.

Q. Could we get the original, if that would make any difference?

A. It does not make any difference, because we have the signatures of the parties here.

Mr. Mancuso: That is all.

A. In my testimony a moment ago, saying I did not know how many copies I sent to Liebman, I see in my letter I say, "Dear Ben: I am enclosing the original and copy of a stipulation from Edward T. Mancuso which he requests that you sign." So I take it, it is self-evident I received them from you and forwarded them on to him. [57]

Mr. Julian: Q. At what point did you advise Mr. Liebman it was a proper document to sign?

A. I don't know whether it was on this date or at some subsequent date, I don't know, because in my letter to him I stated if the facts as related in the stipulation conformed to his ideas on the subject I would suggest that he sign both these stipulations and return the same to me.

Q. You are not absolutely positive that he so advised you?



(Testimony of Joseph C. Haughey.)

A. I am quite sure that Liebman had phoned me and told me he had signed and returned them to me or to Mr. Mancuso.

Q. Then you wish to correct your former testimony that you advised him in your presence and Mr. Taaffe's presence?

A. When I testified to that I did not say definitely that Mr. Liebman was present. I said that I did counsel with Mr. Taaffe with respect to the situation, and in our opinion the stipulations were all right, and I said in my testimony given on direct examination that I was not sure that Liebman was present.

Mr. Julian: That is all.

[Endorsed]: Filed July 9, 1945. [58]

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[Title of District Court and Cause.]

Monday, February 5, 1945

### OPINION OF COURT

The Court: The oral testimony does not cause the Court to draw a conclusion different from that which the Court would feel that the other evidence required it to draw without the oral testimony.

I have understood during the trial that the defendants, Jeanette Liebman, Administratrix of the Estate of Ben Liebman, deceased, who is substituted for the defendant Ben Liebman, and the Massachusetts Bonding Insurance Company, claim



that this stipulation which is attached as Exhibit A to defendants' answer is in law a receipt and release as to the liability alleged in the cause of action set forth in plaintiff's complaint. [59] The stipulation is not entitled a release, and I find no sentence, clause or language in the stipulation which expressly releases either one of the defendants from the obligation sued upon in this action. It seems to me also that there is no language in the stipulation which by implication or inference conveys such an idea. I have no doubt that Ben Liebman hoped and may have expected that, by depositing this overall sum of \$3,230.67, including \$1,438.52 claimed by the plaintiff, with the Trustee in Bankruptcy, it would result in Mr. Liebman not afterwards having to bother with the proper disposition of that \$1,438.52; and that, by depositing such \$1,438.52 with the Trustee in Bankruptcy under this stipulation, said sum together with the remainder of the overall sum would finally reach the hands of the person legally entitled to it. As I say, I have no doubt that Mr. Liebman may have had some such hope and expectation as that just mentioned as one of the possible objectives in his mind when he made that deposit with the Referee in Bankruptcy pursuant to the terms and conditions of this stipulation. However, rights given by statute and rights given by contract are not taken away by implication or merely by the hope and expectation of only one of the parties in the absence of some circumstance strongly establishing the giving away of such rights.

That leads to the question, what is the true analysis of the right which is here sued upon? I think that the right here sued upon is a special suretyship right in favor of this plaintiff guaranteed by this statute called the Miller Act. Under that statute Mr. Liebman and the Massachusetts Bonding Insurance Company are not called upon to assume as principals the obligations of the Aetna Electric Company to pay the plaintiff for materials furnished by the plaintiff to the Aetna Electric Company, but the Miller Act, by reason of the fact that the plaintiff in this action supplied [60] the electrical material to the Aetna Electric Company for installation in buildings constructed under a government construction program created what I have just described as a special suretyship right in the nature of a guarantee that the principal obligation of the Aetna Electric Company to the plaintiff would be paid, namely, the obligation of the Aetna Electric Company to pay for the supplies furnished to it by the plaintiff. That special suretyship right has not been expressly discharged or acquitted by this stipulation which is attached to the defendants' answer. The Court cannot presume that the parties intended that it should be, in the absence of some expression so stating or some conduct unmistakably pointing to that result.

It is, therefore, the finding, conclusion and decision of this Court that the defendants, Jeanette Liebman, Administratrix of the Estate of Ben Liebman, deceased, and Massachusetts Bonding Insurance Company, are liable to the plaintiff under that

special obligation created by the Miller Act, and that plaintiff have judgment against those defendants in the sum of \$1,438.52, with interest thereon at the rate of seven per cent, and for the costs of this action to be taxed by the clerk.

[Endorsed]: Filed July 10, 1945. [61]

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District Court of the United States,  
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 21 pages, numbered from 1 to 61, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of United States of America for use and benefit of California Electric Supply Company, a corporation, Plaintiff, vs. Ben Liebman, etc., Massachusetts Bonding and Insurance Co., a corporation, et al., Defendants No. 23289 S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$16.40 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 11th day of July A. D. 1945.

[Seal]

C. W. CALBREATH,

Clerk

By E. VAN BUREN,

Deputy Clerk. [62]

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[Endorsed]: No. 11102. United States Circuit Court of Appeals for the Ninth Circuit. Ben Liebman, also known as B. Liebman, Massachusetts Bonding and Insurance Company, a Corporation, Appellants, vs. United States of America for the use and benefit of California Electric Supply Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed July 18, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11,102

BEN LIEBMAN, also known as B. LIEBMAN,  
and the MASSACHUSETTS BONDING AND  
INSURANCE CO., a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA for the use and  
benefit of CALIFORNIA ELECTRIC SUP-  
PLY COMPANY, a corporation,

Appellee.

STATEMENT OF POINTS AND  
DESIGNATION

Appellants adopt as their statement of points on appeal the statement of points already contained in the certified typewritten copy of the transcript on file in this case.

And in support of those points appellants designate the entire certified typewritten transcript of record for printing.

Dated this 20th day of August, 1945.

JOSEPH C. HAUGHEY

Attorney for Appellants

[Endorsed]: Filed Aug. 21, 1945. Paul P.  
O'Brien, Clerk.



